FILED
JUN 7 1961
JAMES R. BROWNING, Clerk

In The

Supreme Court of The United States

OCTOBER TERM, A.D. 1960

NO. [redacted]

PUEBLO DE PECOS, PUEBLO DE JEMEZ, AND PUEBLO DE JEMEZ ACTING FOR AND IN BEHALF OF PUEBLO DE PECOS, PETITIONERS,

v.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:
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v.

THE UNITED STATES, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO COURT OF CLAIMS

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by claimants for a Writ of Certiorari to review a judgment of the United States Court of Claims rendered in the above-entitled cause on the tenth day of March, 1961.

1. SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED.

This is an action brought before the Indian Claims Commission under the provisions of the Act of August 13, 1946 (60 Stat. 1050) by the Pueblo de Pecos, petitioner, against the United States on July 30, 1951, asking for just and fair

compensation for the loss of the Pecos Pueblo Grant consisting of 18,763.33 acres. An adverse opinion was rendered by the Indian Claims Commission on December 11, 1959 and Petitioner appealed to the United States Court of Claims on April 11, 1960. The United States Court of Claims entered an order on the 10th day of March, 1961 affirming the decision of the Indian Claims Commission, and it is this order which Petitioner seeks to have reviewed by Writ of Certiorari.

After a showing that the Pueblo de Pecos had been merged into the Pueblo de Jemez by Act of June 19, 1936 (49 Stat. 1528) the Petition was amended to include the Pueblo de Jemez, and Pueblo de Jemez acting for and on behalf of Pueblo de Peços as Petitioners.

The Pueblo Lands Board Act of June 7, 1924, (43 Stat. 636) provides a method to compensate the Pueblo Indians for the loss of lands whenever the Board determined that such lands or water rights could have been recovered for said Indians by seasonable prosecution by the United States. The Pueblo Lands Board investigated the claim of Pueblo de Pecos for loss of lands patented to it by the United States November 1, 1864, known as the Pecos Pueblo Grant and found that the title of the Indians to the whole Grant had been extinguished, but that "seasonable prosecution upon the part of the Government would have resulted in protecting this Indian claim." (Finding of Fact No. 7 attached hereto in opinion of Indian Claims Commission.)

Having made this finding it is the contention of Petitioner that the Pueblo Lands Board failed to carry out the mandate

of Congress as expressed in Sections (a), (b) and (c) of the Pueblo Lands Board Act, by failing to make a report of the fair market value of said land and water rights. Instead the Board made a lump sum award of $1.50 per acre for the loss of the lands. The Act of June 7, 1924 recognized that the United States was guardian of the Pueblo Indians. The actions of the Pueblo Lands Board were carried out to perform the duties of guardian. The negligence complained of is a breach of the Guardian and Ward relationship.

The act contained a provision that the report of the Pueblo Lands Board shall have the force and effect of a judicial finding and final judgment unless within 60 days of its filing in the United States District Court for the District of New Mexico the government, or the Pueblo involved, or the Indians, petition the Court for a review of the report. The Indians were represented by counsel employed and paid by the government. The position of special attorney for the Pueblo Indians of New Mexico was created in 1898, and the various appropriation for this position appear in the following acts: 30 stat. 940; 31 stat. 1077; 32 stat. 265; 32 stat. 999; 33 stat. 307; 33 stat. 1063; 34 stat. 359; 34 stat. 1041; 35 stat. 799; 36 stat. 278; 36 stat. 1067; 37 stat. 528: 38 stat. 92; 38 stat. 594.

In this action the government has raised the defense of res judicata, based upon its own failure to appeal from the report of the Pueblo Lands Board. Petitioner has argued the distinctions between this situation and the usual case of res judicata, but both the Indian Claims Commission and the United States Court of Claims has upheld the defense of res judicata.

II. JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the provisions of Section 705 of Title 25 of the United States Code which reads as follows:

> "Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28."

III. RELEVANT PARTS OF STATUTES INVOLVED.

1. The present case was filed pursuant to the Act of August 13, 1946, 60 Stat. 1049, appearing in Title 25 of the United States Code as Section 70 et. seq:

> "70. CREATION OF COMMISSION
>
> There is created and established an Indian Claims Commission, referred to in this chapter as the Commission. Aug. 13, 1946, c. 959, 1, 60 Stat. 1049.
>
> "70a. Jurisdiction; claims considered; offsets and counterclaims.
>
> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agree-

ments between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States."

2. Relevant parts of the Pueblo Lands Board Act of June 7, 1924, 43 Stat. 636, 25 U.S.C. Sec. 339, are as follows:

Act June 7, 1924, c. 331, 43 Stat. 636, reads as follows:

"That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its sovereign capacity as guardian of said Pueblo Indians shall by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim

or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

"2. That there shall be, and hereby is established a board to be known as "Pueblo Lands Board" to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States. The board shall be provided with suitable quarters in the city of Santa Fe, New Mexico, and shall have power to require the presence of witnesses and the production of documents by subpoena, to employ a clerk who shall be empowered to administer oaths and take acknowledgments, shall employ such clerical assistance, interpreters, and stenographers with such compensation as the Attorney General shall deem adequate, and it shall be provided with such necessary supplies and equipment as it may require on requisitions to the Department of Justice. The compensation and allowance for travel and expenses of the member appointed by the President shall be fixed by the Attorney General.

"It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated where necessary by field notes and plats, the lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the said

board shall find not to have been extinguished in accordance with the provisions of this Act, and the board shall not include in their report any claims of non-Indian claimants who, in the opinion of said board after investigation, hold and occupy such claims of which they have had adverse possession, in accordance with the provisions of section 4 of this Act: Provided, however, That the board shall be unanimous in all decisions whereby it shall be determined that the Indian title has been extinguished.

"The board shall report upon each pueblo as a separate unit and upon the completion of each report one copy shall be filed with the United States District Court for the District of New Mexico, one with the Attorney General of the United States, one with the Secretary of the Interior, and one with the Board of Indian Commissioners.

"3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

"4. That all persons claiming title to, or ownership of, any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action, as follows, to wit:

"(a) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious actual, exclusive, continuous, adverse possession of the premises claimed, under color of title from the 6th day of January, 1902, to the date of the passage of this Act, and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation, or adverse possession of the Territory or of the State of New Mexico, since the 6th day of January, 1902, to the date of the passage of this Act, except where the claimant was exempted or entitled to be exempted from such tax payment.

"(b) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed with claim of ownership, but without color of title from the 16th day of March 1889, to the date of the passage of this Act, and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation or adverse possession of the Territory or of the State of New Mexico, from the 16th day of March, 1899, to the date of the passage of this Act, except where the claimant was exempted or entitled to be exempted from such payment.

"Nothing in this Act contained shall be construed to impair or destroy any existing right of the Pueblo Indians of New Mexico to assert and maintain unaffected by the provisions of this Act their title and right to any

land by original proceedings, either in law or equity, in any court of competent jurisdiction and any such right may be asserted at any time prior to the filing of the field notes and plats as provided in section 13 hereof, and jurisdiction with respect to any such original proceedings is hereby conferred upon the United States District Court for the District of New Mexico with right of review as in other cases: Provided, however, that any contract entered into with any attorney or attorneys by the Pueblo Indians of New Mexico, to carry on such litigation shall be subject to and in accordance with existing laws of the United States.

"5. The plea of such limitations, successfully maintained, shall entitle the claimants so pleading to a decree in favor of them, their heirs, executors, successors, and assigns for the premises so claimed by them, respectively, or so much thereof as may be established, which shall have the effect of a deed of quitclaim as against the United States and said Indians, and a decree in favor of claimants upon any other ground shall have a like effect.

"The United States may plead in favor of the pueblo, or any individual Indian thereof, as the case might be, the said limitations hereinbefore defined.

"6. It shall be the further duty of the board to separately report in respect of each such pueblo—"

"(a) The area and character of any tract or tracts of land within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New

Mexico and the extent, source, and character of any water right appurtenant thereto in possession of non-Indian claimants at the time of filing such report, which are not claimed for said Indians by any report of the board.

"(b) Whether or not such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians. Seasonable prosecution is defined to mean prosecution by the United States within the same period of time as that within which suits to recover real property could have been brought under the limitation statutes of the Territory and State of New Mexico.

"(c) The fair market value of said water rights and of said tract or tracts of land (exclusive of any improvements made therein or placed thereon by non-Indian claimants) whenever the board shall determine that such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians, and the amount of loss, if any, suffered by said Indians through failure of the United States seasonably to prosecute any such right.

"The United States shall be liable, and the board shall award compensation, to the pueblo within the exterior boundaries of whose lands such tract or tracts of land shall be situated *or to which such water rights shall have been appurtenant* to the extent of any loss suffered by

said Indians through failure of the United States seasonably to prosecute any right of the United States or of said Indians, subject to review as herein provided. Such *report and award shall have the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States for such losses.* Such report shall be filed simultaneously with an in like manner as the reports hereinbefore provided to be made and filed in section 2 of this Act.

"*At any time within sixty days after the filing of said report with the United States District Court for the District of New Mexico as herein provided the United States or any pueblo or Indians concerned therein or affected thereby may,* in respect of any report upon liability or of any finding of amount or award of compensation set forth in such report, *petition said court for judicial review of said report,* specifying the portions thereof in which review is desired. Said court shall thereupon have jurisdiction to review, and shall review, such report, finding, or award in like manner as in the case of proceedings in equity. In any such proceeding the report of the board shall be prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be rebutted by competent evidence. Any party in interest may offer evidence in support or in opposition to the findings in said report in any respect. Said court shall after hearing render its decision so soon as practicable, confirming, modifying, or rejecting said report or any part thereof. At any time within

thirty days after such decision is rendered said court shall, upon petition of any party aggrieved, certify the portions of such report, review of which has been sought, together with the record in connection therewith, to the United States Circuit Court of Appeals for the Eighth Circuit, which shall have jurisdiction to consider, review, and decide all questions arising upon such report and record in like manner as in the case of appeals in equity, and its decision thereon shall be final.

"Petition for review of any specific finding or award of compensation in any report shall not affect the finality of any findings nor delay the payment of any award set forth in such report, review of which shall not have been so sought, nor in any proceeding for review in any court under the provisions of this section shall costs be awarded against any party.

"17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and *no sale*, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, *made by any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.*

IV. THE QUESTIONS PRESENTED.

1. Whether unfair and dishonorable dealing by the Unit-

ed States, as set forth in the Act of August 13, 1946, is established by proof that the Pueblo Lands Board failed to carry out its duty as defined by Congress in the Act of June 7, 1924.

2. Whether the Government can raise res judicata based upon its own failure to appeal when the Pueblo was represented by Government attorneys employed and paid by the United States.

3. Whether the failure to appeal was not part of the unfair and dishonorable dealing complained of.

4. Whether the Government was not derelict in its duties as guardian of the Pueblo Indians, which status was clearly established by the Act of June 7, 1924.

V. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The reasons relied upon for the allowance of the Writ are that the Pueblo Indians are a simple and uninformed and inferior people (U. S. v. Sandoval, 231 U. S. 39) and Congress has passed two acts for their assistance: The Pueblo Lands Board Act of June 7, 1924 (supra) and the Indian Claims Commission Act of August 13, 1946 (supra), and this case involves an interpretation of both of these Acts of Congress. That the alleged failure of the Pueblo Lands Board to carry out its duties and obligations to the Indians involves an official agency of the Government and Petitioner is entitled to have this passed upon by the highest court in the land. That justice is upon the side of the Indians who lost their lands through the negligence of the United States and have failed to be awarded its fair market value as required by Congress.

That the defense of res judicata in this case is not the

usual defense where the issue had been tried in another tribunal, but is based solely upon the failure of the government to seek a review of the report of the Pueblo Lands Board. This award had never been passed upon by a court of law until the present action was filed. The government is taking advantage of its own laches, and claiming res judicata where no adjudication took place.

That the following conclusion of the Indian Claims Commission (page 10 of opinion of the Commission), is contrary to the decisions of this court:

"In the absence of legal cases to definitely support petitioners proposition, it appears to the Commission that the United States should not be held strictly to the standards which may be set for guardians and wards regarding conflict of interest in litigation and furnishing legal counsel."

That the United States is guardian for Petitioner was established by 25 U.S.C. 331, 43 Stat. 636, and has been recognized by this court in Pueblo of Santa Rosa v. Fall, 273 U.S. 315, 47 Sup. Ct. 361, and U. S. v. Alonzo 249 F. 2d 189 (Certiorari denied 355 U.S. 940, 78 S. Ct. 429, 2 L. Ed 2d 421).

Petitioner claims that the guardianship of the United States over the Pueblo Indians of New Mexico was established by the Act of June 7, 1924, whether such status existed for Indians generally or not, and the government should be held to a strict accountability of the guardian and ward relationship.

Wherefore, Petitioner prays that a writ of Certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

Dated this 17 day of May, 1961.

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Attorney for Petitioner

OF COUNSEL:

DUDLEY CORNELL
CLAUDE S. MANN
MARK J. CLAYBURGH

In the United States Court of Claims

App. 1-60

PUEBLO DE PECOS, PUEBLO DE JEMEZ, AND
PUEBLO DE JEMEZ ACTING FOR AND ON
BEHALF OF PUEBLO DE PECOS

v.

THE UNITED STATES

ORDER

This case comes before the court on appeal from the Indian Claims Commission (8 Ind. Cl. Comm. 195). Upon consideration thereof, together with the briefs and oral argument of counsel,

IT IS ORDERED this tenth day of March, 1961, that the decision of the Indian Claims Commission be and the same is affirmed.

BY THE COURT

MARVIN JONES
Chief Judge

Before The Indian Claims Commission

PUEBLO DE PECOS, PUEBLO DE JEMEZ, AND PUEBLO DE JEMEZ ACTING FOR AND ON BEHALF OF PUEBLO DE PECOS, Petitioners,	)	Docket No. 174
v.	)	
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: DECEMBER 11, 1959

Appearances:

CLAUDE MANN, DUDLEY CORNELL, AND
W. J. CLAYBURGH, Attorneys for Petitioners.
W. A. ROCHOW, WITH WHOM WAS
MR. ASSISTANT ATTORNEY GENERAL
PERRY W. MORTON, Attorneys for Defendant.

OPINION OF THE COMMISSION

Watkins, Commissioner, delivered the opinion of the Commission.

The original petition in this case, filed July 30, 1951, by the Pueblo de Pecos, presented a claim based upon the alleged inadequate and insufficient award of the Pueblo Lands

Board and payment by Congress of $1.50 an acre, or $28,145.00, for the loss of the 18,763.53 acre Pueblo de Pecos Grant, shown in the patent and plat marked Exhibit A attached to the petition. The petitioners prayed for judgment in such amount as would provide just and fair compensation for such loss, less the payment already received.

In its first defense, the defendant alleged that "claimant is not a proper plaintiff since by virtue of the Act of June 16, 1936 (49 Stat. 1528), the Indian Pueblos of Jemez and Pecos were consolidated and merged into the Pueblo de Jemez and all rights and claims of either of said tribes became vested in the consolidated tribe, The Pueblo de Jemez".

Thereafter, on July 25, 1955, the Pueblo de Pecos filed a motion for leave to amend its petition by making "Pueblo de Jemez, acting for and on behalf of, Pueblo de Pecos" claimant in the case and by amending Paragraph VII to include a plea of lack of fair and honorable dealings. The defendant filed objections to the motion and moved to dismiss the petition.

After receipt of briefs thereon, the Commission issued a Per Curiam Opinion (December 13, 1955; 4 Ind. Cl. Comm. 130) and Order overruling the defendant's objections and motion, and allowing the addition of the Pueblo de Jemez as a separate party claimant and as a party "acting for and on behalf of, Pueblo de Pecos," and the amending of Paragraph VII. An amended petition was filed April 30, 1956 with typewritten inserts making the authorized amendments.

Both the petitioners (Pet. Findings pp. 1-2) and defendant (Def. Brief, p. 3) agree that the issues to be decided at this time are (a) whether the Pecos Pueblo and Jemez Pueblo

are separate tribes entitled to assert a claim before this Commission, and (b) whether the action of the Pueblo Lands Board in awarding the Pecos $1.50 an acre for the loss of the lands and water rights involved was res judicata as to the questions presented by the amended petition.

PETITIONERS AS PARTIES

The petitioners argue that they are each Indian tribes entitled to file and prosecute this claim (Pet. Brief, p. 3-4) and that the defendant is estopped to deny the right of the Pecos to assert the claim because of the approved attorney contract of the Pecos (p. 5). The position of the defendant (Def. Brief, pp. 36-38) is that the Commission erred in reaching the conclusion in 4 Ind. Cl. Comm. 130 that the Act of June 16, 1936 did not abolish the Pueblo de Pecos as a tribe; that the Pueblo de Pecos is not a proper party; and that the amended petition with Pueblo de Jemez as a petitioner was filed after the expiration of the time allowed for filing claims.

It is only necessary to here state that the Commission stands on its former decision concerning the parties herein, as reiterated in Finding 2. Since the addition of the Pueblo de Jemez as a petitioner did not in any way prejudice the defendant in this action, the fact that the amended petition was filed after the time for filing claims is immaterial.

RES JUDICATA

Both parties brief this question (Pet. Brief, pp. 5-10; Def. Brief, pp. 22-36). It is the contention of the defendant that the award of $1.50 per acre by the Pueblo Lands Board to the Pueblo de Pecos for loss of the lands in the Pecos Pueblo Grant is res judicata of the claim now before the Commission. The Board's determination is contained in its reports.

Of the four reports in evidence which are all dated August 4, 1930, Report No. 3 (Def. Ex. 5) and Report No. 4 (Def. Ex. 6) are not important in the present controversy.

Report No. 1 (Def. Ex. 3) is entitled, "Report of Title to Lands Granted or Confirmed to Pueblo Indians", and is made under Section 2 of the Act of June 7, 1924 (43 Stat. 636). Material parts thereof are set out in Finding 6 herein. The Pecos Pueblo Grant is described by metes and bounds (pp. 4-8 of Def. Ex. 3). The report notes (p. 9) that the Pecos had been greatly reduced by constant attacks by hostile Indians, that it suffered several severe epidemics and was from 1825 subjected to every form of coercion and compulsion on the part of the local Mexican authorities. A grant was actually made within this Pueblo area in 1825 and possession given, as appears from an 1825 report of a committee which asked that "all their lands be restored to the natives of the Pueblo of Pecos of which they were plundered" (See Def. Ex. 11, the document in Spanish, and Def. Ex. 10, a translation). Report No. 1 then states that, because of the continued harrassing, the seventeen remaining members of the pueblo accompanied their kinsmen to Jemez, where they and their descendants have since lived (p. 10). "In 1885 an examination of the title to the Pecos Pueblo was made by the Surveyor General, who approved it and recommended confirmation of the grant. This action Congress took by Act of December 22, 1858. In 1864 a patent was issued to the same." In 1859 the Pecos Pueblo requested that their lands be restored to them or that they be sold or leased for their account and additional lands purchased for them in the Jemez section (pp. 10-11). This, together with later and

similar requests, made it appear to the Board that there was never any intentional abandonment of their rights by the few surviving Pecos Indians. The Board recommended that a study be had of this long deferred request and that suitable lands be purchased near Jemez, if possible (p. 11). Church records show there were about 250 claiming Pecos ancestry. "They are recognized as a separate entity and are accorded an officer in the annual election."

Report No. 2 of the Pueblo Lands Board (Def. Ex. 4) is entitled "Report concerning Indian Titles Extinguished" and is made under Section 6 of the Act (See Finding 7 herein). The area of the Pecos Pueblo Grant is set out as 18,814.559 acres (p. 1 of Def. Ex. 4). There were 339 adverse claims by non-Indian claimants covering the entire area (p. 2). The Board determined "that title to all of the lands within the external boundaries of the Pecos Indian Grant is extinguished." (It does not appear that there are any water rights lost to the Indians to which specific mention should be made".) The ownership of the various tracts was determined by a survey and study by the Cadastral Engineer and "by an independent investigation conducted by the Board". "It is the belief of the Board that seasonable prosecution upon the part of the government would have resulted in protecting this Indian claim" (pp. 2-3). Therefore, an award was made for the loss sustained (pp. 3-5). The Board acknowledged the difficulty of determining a fair basis for the award. It determined that the figures for the entire tract should be based on its approximate average value from the occupancy of this territory in 1846 to the time of the award, which was set at $1.50 per acre or $28,144.995. The Board then sets out a number of transactions and conveyances with-

in the area (pp. 5-9). "In 1868 eleven of the survivors of the Pecos Pueblo sold their interest in the grant to one John Ward, who had been Indian Agent and was on very friendly terms with the people, the idea being that he would resell three-fourths of it, if possible, for the benefit of the People of the Pueblo"(p. 5). In 1873 the Pecos Indians conveyed to Frank Chapman what interest they had in the grant of 18,763.35 acres for a consideration of $5,000.00. The same year Ward conveyed to Chapman for a consideration of $5,000.00. Other conveyances were for varying interests and for named considerations of from one dollar to $19,038.-63. There is some indication that "in the years 1841-1842 a proceeding was brought before the then Governor of Mexico looking to the abandonment of this Pueblo" (p. 7). The fact that Congress later confirmed the grant in the Pueblo made it appear to the Board that the Governor's approval, if he gave it, was not in accordance with the existing laws of Mexico at that time. Another line of title, based on the 1825 Mexican Grant, developed in the settlers who occupied the congested areas within this grant (p. 9). This made necessary a quieting title action after the 1912 agreement mentioned above. "This suit ended in the settlers generally conveying any interest which they might have in the entire grant to the holders under the long line of transfers to, reserving to themselves however the particular tracts which they then claimed and occupied." The concluding paragraphs of Report No. 2, which are largely reiteration, contain a finding that the amount of money received by the Indians in the transactions in which they were parties was an inadequate sum for this large acreage (p. 10).

The defendant describes the Pueblo Lands Board as a quasi-judicial body (Def. Brief, P. 24). It was composed of three members, one representing the Secretary of the Interior, another the Attorney General, and a third appointed by the President of the United States. The 1924 Act directed the Board to investigate, determine and report upon all lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the board shall find not to have been extinguished in accordance with the provisions of the Act. Section 6 required reports of other matters in respect to each pueblo, including the tracts of land and water rights appurtenant thereto in the possession of non-Indian claimants. (If the Board found that such tracts could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of the Indians, the United States was made liable for such loss and the Board was to determine the amount of loss and award compensation.) The Board was also required to report the fair market value of such tracts and water rights exclusive of any improvements made therein or placed thereon by non-Indian claimants.

(Section 6 provided that "such report and award shall have the force and effect of a judicial finding and final judgment upon the question and the amount of compensation due to the Pueblo Indians from the United States for such losses". At any time within 60 days after the filing of such report with the United States District Court, the United States or any

Pueblo or Indians affected thereby could appeal to that court for judicial review of the Board's findings.) In any such proceeding the report of the Board was prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be rebutted by competent evidence which all interested parties had a right to present. The District Court could confirm, modify or reverse the findings of the Board and any party aggrieved could appeal to the United States Circuit Court of Appeals.

Since no appeal was taken either by the United States or by the Pueblo de Pecos, it is the position of the defendant that the Board's award is a final judgment fixing the value of the lands and water rights lost by the Pecos Pueblo and such judgment is not subject to review or revision by this Commission (Def. Brief, p. 25).

The petitioners do not appear to question the power of the Pueblo Lands Board to make a determination which could, under the rules of res judicata, bar the subsequent relitigation of the same issue between the same parties. *Rather the petitioners argue that the defense of res judicata is not applicable here because the Board failed to follow the provisions of the Act of* 1924 *and, therefore, the Pecos claim could not have been decided on its merits (Pet. Brief, p.* 6). *An exception to the principle of res judicata, as defined in* 50 *CJS* 51, *Sec.* 626, *is quoted as follows*:

> A judgment in a suit will operate as a bar to a subsequent suit on the same cause of action if, and only if, the judgment and the proceeding leading up thereto involved, or afforded full legal opportunity for, and investigation and determination of the merits of the suit.

The petitioners say that the Board failed to follow the dictates of Congress in the following respects:

1. The fair market value of the water rights were not considered by the Board in making the awards.
2. The Board did not appraise or make a thorough investigation as to the amount of water available.
3. The Board committed error of judgment in not allowing interest or loss of use in considering damages.

These three alleged failures of the Board do not bring the award to the Pecos within the exception set out above. Congress required the Board to investigate and report its findings and awards. This it did in the case of the Pecos. Petitioners' Finding 4 admits that hearings were held leading to the award to the Pecos Pueblo and that the Pueblo was represented by legal counsel. The reports and determination of the Board are in evidence. Apparently the reports on the Pecos were filed in the United States District Court to start the running of the 60 days within which any party could proceed in that court to question the Board's determination. Congress thereafter paid the award. This all tends to show that the proceeding leading up to the award "involved, or afforded full legal opportunity for, an investigation and determination". The petitioners have not proved otherwise. The petitioners' complaints rather go to the manner in which the Board decided the matter. *Such matters could have been presented to the District Court on appeal. Since there was no appeal, one can only assume, lacking evidence to the contrary, that the Pecos at that time were satisfied with the award and the proceedings of the Board leading up to it, at least to the extent that they did not wish to appeal.*

The petitioners next argue that "the defense of res judicata cannot legally be applied where the Ward was not represented otherwise than by the Guardian or where the latter conducted the litigation negligently or where the interest of the Ward and the Guardian are in conflict", citing 50 CJS 341, Sec. 797 (Pet. Brief, p. 7). Petitioners' Finding 4 asserts that the interests of the government, as Guardian, and the Pecos as Ward, were in conflict; that the Pueblo was not represented by legal counsel of its own choosing; and that the litigation was conducted negligently. Supporting evidence referred to by footnote is largely from Senate Subcommittee hearings.

In response, the defendant says (Def. Brief, p. 34):

> But petitioners have not produced one bit of evidence to show that the counsel provided by the government failed properly to represent them and present their claim to the Board. Furthermore, some Pueblos saw fit to appeal their cases to the District Court and employed private counsel to prosecute such appeals. No such action was taken by these petitioners and there is no evidence that they ever requested private counsel to represent them before the Pueblo Lands Board.

In the absence of legal cases to definitely support petitioners' proposition, it appears to the Commission that the United States should not be held strictly to the standards which may be set for guardians and wards regarding conflict of interest in litigation and furnishing legal counsel. The United States as a sovereign, is a composite of all its people. *Thus any claim against the sovereign could narrowly be said to be*

a conflict of interest, because any recovery is going to be partially paid by the claimant, as a part of the United States. It could also be technically argued that the government, in prosecuting a criminal and at the same time providing counsel for the accused, is acting in conflict with itself. But the United States as sovereign it is in a unique situation. It is immune from suit and can only be sued by its own consent (91 C.J.S. Sec. 176). Congress has power to prescribe conditions on which attorneys will be allowed to represent claimants before any of the courts of the government (Sec. 197). Congress furnishing for many years a special attorney to represent the Pueblo Indians of New Mexico was an act of beneficence to give the Indians counsel without cost to them, and since all attorneys are sworn to protect the interests of their clients, the fact that they were paid by the government should not make their efforts in asserting a claim against the United States subject to attack.

Neither is there sufficient evidence to establish that the litigation was conducted negligently. The petitioners do not dispute and would take advantage of some of the findings of the Board, such as the finding that even though the Pecos had left their lands, "there never was an intentional abandonment of their rights", and that the Pecos were entitled to an award because "seasonable prosecution upon the part of the Government would have resulted in protecting this Indian claim" (Pet. Finding 5, Fn. 8). Petitioners question the amount of the award, relying mainly on statements made at subsequent Congressional hearings as to what the Board considered in making its awards. The Board did take into consideration water rights (Def. Brief, Appendix, pp. 40-61).

The Board's statement, previously quoted, that "it does not appear that there are any water rights lost to the Indians to which specific mention should be made" does not mean that the Pecos River passing through the grant had no bearing on the value of the land and the amount of the award. *The Board did not set a separate specific figure for loss of water rights.* The Board did not include any interest in its awards and was not required to do so by statute. Neither was it required to consider "loss of use".

Why did not the Pecos appeal the Board's award in the United States District Court? The record does not answer this question, and as previously stated in this opinion, it can only be assumed that the Pecos at that time were satisfied with the award. We certainly do not have sufficient facts now to say that counsel for the Pecos negligently conducted the litigation by not proceeding to question the award in the District Court. Shortly after the Board's proceedings, a number of Pueblos asked Congress to increase their awards but no such request appears to have been made by the Pecos. The petitioner says (Pet. Finding 5, Fn. 9, p. 17):

> In fairness to other Pueblos of New Mexico the Senate Committee on Indian Affairs, after reviewing the awards made by the Board, recommended that said other Pueblos were entitled to additional compensation. But in its report the Committee did not even mention or refer to the Pecos Pueblo or to the award made by the Board to it. (Def. Ex. 16)

The fact that the Committee did not recommend an additional award for the Pecos and that Congress did not make

one tends to indicate that there was little or no dissatisfaction with the Pecos award.

The final argument of the petitioners is that "there is much to litigate in this proceeding that was not decided when the Pueblo Lands Board made its award", naming again "the question of interest, water rights and loss of use" (Pet. Brief, p. 9). Cromwell v. County of Sac, 94, N. S. 351, 24 L. Ed. 195, is cited as setting forth a second branch of the rule of res judicata (Pet. Brief, pp. 8-9):

> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a Judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the Judgment conclusive in another action.

While the determination and award of the Pueblo Lands Board was made in accordance with the provisions of the Act of June 7, 1924, and the present claim is brought under Section 2 of the Indian Claims Commission Act of August 13, 1946, the basis of both claims is the loss to the Pecos Indians of the lands of the Pecos Pueblo Grant. As previous-

ly quoted from the Board's Report No. 2, the award for the entire tract of $1.50 an acre was arrived at by figuring "its approximate average value from the occupancy of this territory in 1846 to the present time" (1930). This was done because the Board found that "there is no way to get at the actual value of this land in its entirety as it was at the time that the Government might have acted or at the time when the members of the Pueblo disposed of their holdings".

Pursuant to the Act of June 7, 1924, the determination of the award for loss of lands was entirely in the discretion of the Board. It was within the Board's discretion to base the award on an average value over a period of years, as they did. It should also be noted that no deduction appears to have been made from the award for the considerations which the Pecos Indians had received in previous sales of their lands to private individuals.

The present claim has the same basic issue. Both the Petition and Amended Petition pray that the "defendant be adjudged liable under the Act of August 13, 1946, for an amount that will provide just and fair compensation for the loss of the Pueblo Grant consisting of 18,763.33 acres, less the payment already received under recommendation of the Public Lands Board".

As to the matters petitioners say may be litigated here which were not considered by the Board, it has already been noted that water rights were taken into consideration by the Board. The items of "interest" and "loss of use" seem to be presented in the alternative by petitioners, as the conclusion in their Brief, p. 15, says "plus interest, or loss of use".

Neither of these have been recognized by this Commission in its decisions to date as proper elements of loss or damage in cases of this kind. Obviously there was no "taking" of the lands of the Pecos Indians under the Fifth Amendment. Rather, the United States issued a patent for these lands to the Pecos after they had moved from the Pecos Pueblo Grant, and the Pecos Indians later sold their lands to other parties. This is admitted by the petitioners when they say (Pet. Brief, p. 11), "It was the nonaction of the Government that resulted in the loss of the Pecos Grant lands by the Pecos Indians to others". This is precisely the finding of the Lands Board and the basis of its award, as set out in footnote 19 in support of petitioners' statement.

So even though the present claim is considered a new and different cause of action within the meaning of the second branch of the rule of res judicata, the basic matters in issue are the same as in the proceedings of the Lands Board, and the Board's decision as to such matters is conclusive.

It is therefore the conclusion of the Commission that the petitioners have had a determination of their claim of liability on the part of the United States for the loss they suffered in regard to the lands of the Pecos Pueblo Grant. The determination and award of the Pueblo Lands Board, which

became a final judgment, is res judicata of the claim now before the Commission. Accordingly, the amended petition should be dismissed and it will be so ordered.

ARTHUR V. WATKINS
Associate Commissioner

We concur:

EDGAR E. WITT
Chief Commissioner

WM. M. HOLT
Associate Commissioner

Before The Indian Claims Commission

PUEBLO DE PECOS, PUEBLO DE JEMEZ, AND PUEBLO DE JEMEZ ACTING FOR AND ON BEHALF OF PUEBLO DE PECOS, Petitioners,	)	Docket No. 174
v.	)	
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: DECEMBER 11, 1959

FINDINGS OF FACT

The Commission makes the following findings of fact:

Finding 1.

The original petition was timely filed on July 30, 1951 by the Pueblo de Pecos, Claimants, pursuant to the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1949). By Order of December 13, 1955, the Commission allowed the addition of the Pueblo de Jemez as a separate party claimant and as a party "acting for and on behalf of, Pueblo de Pecos", and the amending of paragraph VII of the petition. Such an amended petition was filed April 30, 1956.

Finding 2.

In accordance with its per Curiam Opinion of December 13, 1955 (4 Ind. Cl. Com. 130), the Commission finds that each of the petitioners, Pueblo de Pecos and Pueblo de

Jemez, is an identifiable group of American Indians, recognized by the Secretary of the Interior of the United States as having authority to represent each of such Pueblos in this case.

Finding 3.

The petitioners in this docket seek to recover the difference between the sum of $28,145.00, which is the amount the United States paid them in 1931 pursuant to an award made by the Pueblo Lands Board for loss of a tract of land known as the Pecos Pueblo Grant, and the fair market value of the lands and water rights lost to them, plus interest, or loss of use, less the value of offsets, if any. The grounds for said claim are that the hearings of the Pueblo Lands Board were not in compliance with the Act of Congress which created said Board, that the conduct of the Government and of the Pueblo Lands Board in the hearings and the award to the Pecos Pueblo constituted unfair and unreasonable dealings, and that the award of $28,145.00 or $1.50 per acre was inadequate, unreasonable, unfair or less than their value.

The Pecos Pueblo Grant is a tract of land consisting of 18,763.33 acres, as shown on the survey plat attached to the Patent (Def. Ex. 1) which the United States issued to the Pueblo of Pecos November 1, 1864. It is located a short distance southeast of the city of Santa Fe in the present counties of Santa Fe and San Miguel, state of New Mexico.

Finding 4.

By Act of June 7, 1924 (43 Stat. 636) Congress provided for the creation of the Pueblo Lands Board in an effort to provide for the final adjudication and settlement of a very

complicated and difficult series of conflicting titles affecting lands claimed by the Pueblo Indians of New Mexico. It was composed of three members, one representing the Secretary of the Interior, another the Attorney General, and a third appointed by the President of the United States.

The Act directed the Board to investigate, determine and report upon all lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the Board shall find not to have been extinguished in accordance with the provisions of the Act.

Section 6 required reports of other matters in respect to each Pueblo, including the tracts of land and water rights appurtenant thereto in the possession of non-Indian Claimants. If the Board found that such tracts could be or could have been at any time recovered for the Indians by the United States by seasonable prosecution of any right of the United States or of the Indians, the United States was made liable for such loss and the Board was to determine the amount of loss and award compensation. The Board was also required to report the fair market value of such tracts and water rights exclusive of any improvements made therein or placed thereon by non-Indian claimants.

Section 6 also provided that "such report and award shall have the force and effect of a judicial finding and final judgment upon the question and the amount of compensation due to the Pueblo Indians from the United States for such losses." At any time within 60 days after the filing of

such report with the United States District Court, which filing was required by Section 2, the United States or any Pueblo or Indians affected thereby could appeal to that court for judicial review of the Board's findings. In any such proceeding the report of the Board was prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be rebutted by competent evidence which all interested parties had a right to present. The District Court could confirm, modify or reverse the findings of the Board and any party aggrieved could appeal to the United States Circuit Court of Appeals.

Finding 5.

The Pueblo Lands Board investigated the claim of the Pecos Pueblo to lands of the Pecos Pueblo Grant which had been patented to them in 1864. Hearings were held and the United States furnished legal counsel for the Pueblo. The findings and determination of the Board, which are material here, are contained in Report No. 1 (Def. Ex. 3) and Report No. 2 (Def. Ex. 4). Both reports are dated at Santa Fe, New Mexico, August 4, 1930, and are signed by Louis H. Warner, Chairman; H. J. Hagerman, for the Secretary of the Interior, and Charles H. Jennings, for the Attorney General.

Finding 6.

Report No. 1, entitled "Report of Title to Lands Granted or confirmed to Pueblo Indians", states in part as follows:

> The Pueblo Lands Board, constituted under Act of Congress approved June 7, 1924, (43 Stat. L. 636) hereby reports under Section 2 of said Act as follows:

Said Board having investigated the lands within the exterior boundaries of the land lying in the counties of San Miguel and Santa Fe, State of New Mexico, confirmed to the Pueblo of Pecos, as shown on photostat map hereto attached and marked "Exhibit A", being a Spanish Grant as confirmed by the Act of Congress approved December 22, 1858, and patented November 1, 1864, has determined and hereby determines that title thereto in said Pueblo has been extinguished in accordance with the provisions of said Act of June 7, 1924, as to the lands set forth by metes and bounds as follows: . . . . . Total area 18,814.559 acres.

The foregoing grant is more particularly described by field notes on file in the office of the Cadastral Engineer, Santa Fe, New Mexico.

According to the best obtainable historical information, the Pueblo of Pecos had been greatly reduced by constant attacks by hostile Indians. It suffered several severe epidemics and was from 1825 subjected to every form of coercion and compulsion on the part of the local Mexican authorities, according to the authenticated records. In fact a grant was actually made within this Pueblo area by these authorities in that year, and apparently a compulsory possession was given, because in the files of the Cadastral Engineer, under File F, Pecos Pueblo, there appears a report of the Committee which apparently was appointed by some assembly.

which finds in favor of the restoration of certain lands to the natives of the Pueblo, saying:

> "Its excellency at that time, 1825, by this violent plundering without doubt did not remember the laws which treat of respecting the property of all individuals."

And it further found:

> "First, that all their lands be restored to the natives of the Pueblo of Pecos of which they were plundered.
>
> Second, that the citizens possessed thereof be notified by the alcalde of that district of the 'no right' which they have acquired in said possession, as the grant was given in lands which have owners."

This report was signed by Pino Baca Arze and rubricated.

Apparently in desperation because of the continued harrassing, the seventeen remaining members of the pueblo accompanied their kinsmen to Jemez. There they and their descendants have since lived.

In 1855 an examination of the title to the Pecos Pueblo was made by the Surveyor General, who approved it and recommended confirmation of the grant. This action Congress took by Act of December 22, 1858. In 1864 a patent was issued to the same.

In the files of the Indian Office there is at least one specific record of a request by Pecos Pueblo to be restored to their lands, or that they be sold or leased for their account and additional lands purchased for them in the Jemez section. This was in 1859. It would ap-

pear, therefore, that there was never any intentional abandonment of their rights by the few surviving Pecos Indians. The records also show later and similar requests, even before they actually signed the deed of conveyance to John Ward; and subsequent happenings indicate that they never intended to create the impression that they had abandoned their rights in the pueblo.

We recommend in connection with the award made by this Board that a study be had of this long deferred request. If suitable lands can be purchased near Jemez, we recommend that such action be taken and such lands assigned to the specific use of those Pecos descendants who are now living in the Pueblo of Jemez. We are informed that the church records show that there are about 250 claiming such ancestry and that they are recognized as a separate entity and are accorded an officer in the annual election. If upon such investigation such lands can not be segregated for the specific use of the Pecos descendants that they shall be added to the Jemez Pueblo generally, with the understanding that the Pecos descendants may profit thereby.

The lands lying within the exterior boundaries of said grant have been surveyed, and the several individual claims are shown on photostat plates hereto attached and marked "Exhibit B".

The claims numbered 1 to 339, are called "exceptions" in the report as this is the usual designation given

to extinguished claims, and are more particularly described as follows: . . . . .

Finding 7.

Report No. 2, entitled "Report Concerning Indian Titles Extinguished", made under Section 6 of said Act, includes the following:

> The area comprised within the outside boundaries of said Pecos Pueblo Grant as confirmed by this Board is 18,814.559 acres. The grant was confirmed by Act of Congress December 22, 1858, and patented on November 1, 1864.
>
> The total number of adverse claims within the exterior boundaries granted or confirmed to the Pueblo of Pecos and in the possession of non-Indian claimants at the time of the filing of this report was 339.
>
> The total area of said adverse claims was 18,814.559 acres.
>
> The Board, for sufficient reasons hereinafter referred to, has determined and hereby determines that title to all of the lands within the exterior boundaries of the Pecos Indian Grant is extinguished.
>
> It does not appear that there are any water rights lost to the Indians to which specific mention should be made.
>
> The present ownership of the various tracts within the exterior boundaries of this Grant was determined by a survey and study of this area by the Cadastral Engineer by direction of the Interior Department and by an independent investigation conducted by this Board in which the whole area was checked out. This situation is an anamolous one in that the Indians by

their own acts and by the lapse of time have apparently lost all possible recoverable interest in the original grant. However, their acts followed demand on their part that the Government take some definite action to protect their rights; and this will appear in the Board's Report No. 1.

It is the belief of the Board that seasonable prosecution upon the part of the Government would have resulted in protecting this Indian claim. Therefore it has seemed wise that an award as indicated elsewhere in this report, should be made for the loss sustained.

To determine a fair basis for such an award, in view of all the circumstances, was difficult. The Board has come to a conclusion which in its opinion is fair to all concerned. The title of the Indian is extinguished and the award is recommended with the suggestion that added lands be bought, if possible, for the benefit of those proving Pecos ancestry, in the vicinity of Jemez where they are now living.

There is no way to get at the actual value of this land in its entirety as it was at the time that the Government might have acted or at the time when the members of the Pueblo disposed of their holdings. In 1855, or thereabouts, the Government was approached, through its agent at Santa Fe, to do something in this matter. It is probable that similar requests were made at other times. The records show that the agent for the Indians at Santa Fe made repeated suggestions of like tenor. Inaction on the part of the Government resulted in the Indians themselves selling their interest, as will appear

more fully later. At no period does it seem that the entire grant was sold under such conditions as would furnish a proper criterion for the Board to go by in the making of this award. The nearest approach to it was in 1912 when an offer was made for at least 12,000 acres of this grant. From papers available it does not seem quite clear what the price was to be as figures running from $2.00 to $3.00 an acre are mentioned; but it was necessary as a condition precedent to such a sale that title should be so quieted as to make the sale possible. As a matter of fact this sale was never consummated because of difficulties which arose after the deal was made but an attempt to quiet title in accordance with the agreement was definitely made about 1919.

To the Board it seems that the figures for the entire tract might properly be arrived at, not upon the basic value as apparently agreed upon in the unconsummated sale of 1912, but rather should be figured (having in mind all the conditions) on its approximate average value from the occupancy of this territory in 1846 to the present time.

We have, therefore, reached the conclusion, everything considered, that $1.50 per acre, which includes, of course, some land that is not suitable for cultivation or grazing, would be a fair basis for an award, and that the amount of loss suffered by the Indians through failure of the United States or of said Indians is $28,144-.995.

This is followed by references to certain transactions and conveyances involving lands of the Pecos Pueblo Grant. "In

1868 eleven of the surviors of the Pecos sold their interest in the grant to one John Ward, who had been Indian Agent and was on very friendly terms with the people, the idea being that he would resell three-fourths of it, if possible, for the benefit of the People of the Pueblo". In 1873 the Pecos Indians conveyed to Frank Chapman what interest they then had in the grant of 18,763.35 acres for a consideration of $5,000.00. The same year Ward conveyed to Chapman for a consideration of $5,000.00. Other conveyances down to the year 1918 were for varying interests and for named considerations ranging from one dollar to $19,038.63. During this period, "from the dates of the original deeds from the Indians in 1858 and 1873 down through to 1918, the various claimants of title had actually exercised control over the tract".

Among these transactions, the Board notes an unsuccessful attempt made in 1896 by some of the settlers to incorporate. It then states:

> Here for the first time, as far as can be ascertained from the records, a statement was made that in the years 1841-1842 a proceeding was brought before the then Governor of Mexico looking to the abandonment of this Pueblo. It does not appear that his approval, if he gave it, was in accordance with the existing laws of Mexico at that time. Otherwise it would hardly seem reasonable that Congress should have confirmed the grant in the Pueblo on the recommendation of the then surveyor general or that it would have subsequently issued authorization of patent to the Pueblo.

After the summary of these transactions, Report No. 2 concludes as follows:

> In the meantime, based on a Mexican Grant of 1825, and subsequent transactions, another line of title developed in the settlers who occupied the congested areas within this grant, so that when the time came for the sale to be carried through for the amount of land indicated in the agreement of 1912, it was necessary for the owners of the entire tract who based their claims on Indian deeds, to bring suit to quiet title against those who claimed through the Mexican grant of 1825. This suit ended in the settlers generally conveying any interest which they might have in the entire grant to the holders under the long line of transfers referred to, reserving to themselves however the particular tracts which they then claimed and occupied.
>
> This interchange of deeds brought the situation down to the present day. It does not seem by any conjecture that it would be possible for the government to now recover any of these lands for the Indians. It is not even likely that such of the Pecos descendants as are now living would want to occupy the lands if they could be recovered. It therefore seemed that the only fair and equitable adjustment of the entire matter was that the entire tract with its hundreds of holdings should be surveyed by the Cadastral Engineer on authorization of the Interior Department. This action was taken and the lands have been extinguished in the individuals claiming rights within those areas.
>
> It is probable also that, had the government season-

ably prosecuted the Indians' interests when it came into control that something might have been recovered for them. The Indians at that time thought that their rights had not been exhausted and, as the records will show, the Indian authorities were approached with a view to having this land either sold for their account, leased, or recovered for them. It does not appear that any action was taken over a period of ten years from the time that this request was made. The Indians then took what was probably their only recourse under existing conditions and sold the land themselves. It does not appear, from the amount of money received in the transactions in which they were parties, that an adequate sum has been received by them for this large acreage. The Board believed that it is fair to all concerned to follow the course indicated.

Finding 8.

It has not been established that the proceedings of the Pueblo Lands Board as to the Pecos Pueblo Grant were unfairly conducted and did not afford a full investigation and determination of the merits of the Pecos claim. Water rights were considered, as shown by the testimony of members of the Board before a Congressional Committee investigating the matter. The Board was not required to award "interest" or compensation for "loss of use". Neither has it been established that the litigation was negligently conducted by counsel for the Pecos. After a subsequent investigation of the awards of the Board, Congress gave additional compensation to certain Pueblos but did not increase the amount of the Pecos award.

Finding 9.

No appeal was taken by the United States or by the Pueblo de Pecos from the award by the Pueblo Lands Board for loss of the lands here involved. That award, therefore, under the provisions of Section 6 of the Act of June 7, 1924, became a "final judgment upon the question and amount of compensation due" to the Pueblo de Pecos from the United States for the loss of such lands and is res judicata of the claim asserted by the petitioners herein.

EDGAR E. WITT
Chief Commissioner

WM. M. HOLT
Associate Commissioner

ARTHUR V. WATKINS
Associate Commissioner

SUPREME COURT, U. S.
No. 138

JUL 5 1961

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961

PUEBLO DE PECOS, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

ROGER P. MARQUIS,
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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Indian Claims Commission (Pet. App. 19-34) is reported at 8 Ind. Cl. Comm. 195. The order of the Court of Claims affirming the Indian Claims Commission (Pet. App. 18) is not reported.

JURISDICTION

The order of the Court of Claims affirming the Indian Claims Commission was entered on March 10, 1961. The petition for a writ of certiorari was filed on June 7, 1961. The jurisdiction of this Court

is invoked under 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s(c).

QUESTION PRESENTED

Whether an award made by the Pueblo Lands Board is *res judicata* of a claim brought under the Indian Claims Commission Act.

STATUTES INVOLVED

The pertinent parts of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70-70v, and of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, are set out in the petition at pages 4 to 12.

STATEMENT

The petitioners brought this action to recover the difference between the sum of $28,145.00, the amount paid them by the United States in 1931 pursuant to an award made by the Pueblo Lands Board for the loss of a tract of land known as the Pecos Pueblo Grant, and the fair market value of this tract. The United States answered that the award made by the Pueblo Lands Board is *res judicata* of the present claim, and the Indian Claims Commission sustained this contention and dismissed the suit (Pet. App. 19-34).

The Pecos Pueblo Grant is an 18,763.33-acre tract near Santa Fe, New Mexico, to which the United States recognized the petitioner's claim by issuing a patent in 1864. Because of various attempts by the Pueblos to convey their lands and because of extensive settlement by non-Indians, serious conflicts as to title and rights to possession of the lands arose. A Con-

gressional study in 1924 revealed that there were some 3,000 claimants to land within the exterior boundaries of the Pueblo grants in New Mexico. H. Rept. 787, 68th Cong., 1st Sess., Cong. Doc. Ser. No. 8229. To settle the complicated questions of title and to secure for the Indians all of the lands to which they were equitably entitled, or fair compensation for any lands and water rights lost because of a failure by the United States seasonably to prosecute the rights of the Indians, Congress passed the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, establishing the Pueblo Lands Board.

The Board's duties included reporting on Pueblo lands then in the possession of non-Indian claimants. Congress assumed liability in cases where the Board should find that such tracts could be, or at any time could have been, recovered for the Indians by the United States by seasonable prosecution of any right of the United States or of the Indians, and the Board was to determine the amount of loss and award compensation. Section 6 of the Act provided that "[s]uch report and award shall have the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States for such losses." Section 6 also provided for appeal to the United States District Court for the District of New Mexico.

The Pueblo Lands Board investigated the claim of the Pueblo de Pecos to the Pecos Pueblo Grant, holding hearings at which the United States furnished legal counsel for the Pueblo (Fdg. 5, Pet. App. 38). The Board determined that the title of the Pueblo de Pecos had been extinguished although the Indians had

never intentionally abandoned their rights (Fdg. 6, Pet. App. 38-42). It further found that "seasonable prosecution upon the part of the Government would have resulted in protecting this Indian claim," and that $1.50 an acre, or $28,145.00, would be a fair award for the loss suffered by the Indians (Fdg. 7, Pet. App. 42-47). No appeal was taken and Congress appropriated the amount recommended in the Act of February 14, 1931, 46 Stat. 1115, 1122.

In the present suit, the petitioner has alleged that the award was not based on fair and honorable dealings; that the Board's proceedings had not given a full opportunity for an investigation and determination of the merits of the claim; that the United States, notwithstanding its guardian-ward relationship to the Indians and the conflict of interest inherent in appearing as guardian before a tribunal it had created, refused the Indians their own legal representation and then negligently failed to represent them fully; and that the Board failed to follow Section 6 of the Pueblo Lands Act. With respect to these allegations the Indian Claims Commission found (Fdg. 8, Pet. App. 47):

> It has not been established that the proceedings of the Pueblo Lands Board as to the Pecos Pueblo Grant were unfairly conducted and did not afford a full investigation and determination of the merits of the Pecos claim. Water rights were considered, as shown by the testimony of members of the Board before a Congressional Committee investigating the matter. The Board was not required to award "interest" or compensation for "loss of use". Neither has it been established that the litigation was negligently conducted by counsel for the Pecos. After a subsequent investi-

gation of the awards of the Board, Congress gave additional compensation to certain Pueblos but did not increase the amount of the Pecos award.

The Commission also found that the Board's award had not been appealed and was therefore, in accordance with Section 6 of the Pueblo Lands Act, a "'final judgment upon the question and amount of compensation due' to the Pueblo de Pecos from the United States" (Fdg. 9, Pet. App. 48). On the basis of these findings, the Commission concluded that the Board's award was *res judicata* of the petitioner's claim and therefore dismissed the suit (Pet. App. 33-34). The Court of Claims affirmed this judgment without opinion (Pet. App. 18).

ARGUMENT

This case presents nothing more than a simple application of the principle of *res judicata*. The Pueblo Lands Act gave awards of the Pueblo Lands Board "the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States * * *." The petition before the Indian Claims Commission in this case alleges that an award made to the Pueblo de Pecos under the Pueblo Lands Act was not based upon fair and honorable dealings and that the Indians were not given a full and fair hearing, but the Commission found that the proof failed to sustain these allegations (Fdg. 8, Pet. App. 47). Having failed to sustain these allegations, the petitioners have nothing more than a suit to relitigate the issues decided by the Pueblo Lands Board, a suit obviously *res judicata*. The Court of Claims has consistently

held that *res judicata* bars relitigation of claims under the Indian Claims Commission Act. *Blackfeet etc. Indians* v. *United States,* 127 C. Cls. 807, certiorari denied, 348 U.S. 835, *Western Cherokee Indians, et al.* v. *United States,* 116 C. Cls. 665, certiorari denied, 340 U.S. 904.

CONCLUSION

For the foregoing reasons, we submit that the petition for a writ of certiorari should be denied.

Respectfully,

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JULY, 1961

☆ U. S. GOVERNMENT PRINTING OFFICE 1961—899830/P. O. 1494